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No. 87-157

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,
Petitioner,

vs.

INDIAN HEAD, INC.,
Respondent.

BRIEF OF THE WESTERN FIRE CHIEFS ASSOCIATION, THE INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, THE SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC., AND THE BUILDING OFFICIALS AND CODE ADMINISTRATORS INTERNATIONAL, INC., AMICI CURIAE IN SUPPORT OF PETITIONER, ALLIED TUBE & CONDUIT CORPORATION

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I

INTEREST OF AMICI CURIAE

Building and safety codes are enacted by states, counties and cities to protect the health and safety of their residents. These codes are highly technical, and require a great deal of time and expertise to develop. The governmental entities which enact such codes often do not have the resources to research, create and update them. In-

stead, the vast majority of such codes are drafted initially as model codes by model code groups. Government relies on the work of the groups, and normally enacts the model codes into law with little or no change.

Amici curiae[1] are four such model code groups, which develop and maintain, update and amend, various building and construction-related codes. The International Conference of Building Officials ("ICBO"), the Building Officials and Code Administrators International, Inc. ("BOCA"), and the Southern Building Code Congress International, Inc. ("SBCCI") are non-profit corporations that promulgate model codes and standards for use by state and local entities. ICBO is the predominant code group west of the Mississippi River, SBCCI predominates in the South and BOCA members predominate in the Northeast and Mid-Atlantic states. The Western Fire Chiefs Association ("WFCA") is a non-profit association that works with ICBO to promulgate the Uniform Fire Code and the Uniform Fire Code Standards in the western states. The voting membership of *amici* is made up entirely of representatives of government. Members of private industry may participate in a non-voting capacity, but only representatives of government — no private industry members — may vote.

Amici curiae are deeply concerned about the continued vitality of the efforts of model code groups to provide to government model codes of the highest quality. Model code groups can achieve that goal only if they receive a full and free flow of information from participants in the model code-making process. The decision of the Second

[1]Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, *amici curiae* have concurrently filed with the Clerk the written consent of all parties to this case for *amici curiae* to file this brief in support of petitioner.

Circuit below removed *Noerr-Pennington* protection from participants in that process. The Second Circuit decision, if not reversed or distinguished from the opinion rendered by the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 817 F.2d 458 (1987), will greatly increase the threat of protracted litigation and antitrust damages against participants in the process, and thus inhibit participation in, and the free flow of valuable information to, model code groups. *Amici* submit that *Noerr-Pennington* protection should be afforded to proper efforts to lobby model code groups, and that improper conduct can best be controlled through the "sham" exception to the *Noerr-Pennington* doctrine.

II

SUMMARY OF ARGUMENT

1. Model code groups provide a vital and beneficial public service, and government relies upon them to do so. The vast majority of health and safety codes are drafted initially as model codes by model code groups, and are normally enacted by political subdivisions with little or no change. As a practical matter, any person wishing to change or affect a fire, safety or other building code of a political subdivision starts that process in the relevant code group. The continued vitality of these groups' efforts depends entirely on the ability of their members, and participants from industry and the public, to express freely political views without the threat of protracted antitrust litigation or liability. The increased threat of such litigation can only have the effect of depriving the model code groups of input vital to their decision-making process, from sources that have the expertise, financial ability, and motive to provide such information.

2. The Second Circuit "decline[d] . . . to extend *Noerr-Pennington* immunity to lobbying activities directed toward a 'quasi-legislative' body such as the NFPA,"[2] notwithstanding the ability to regulate abuses of the process through the sham exception. The Second Circuit bases its decision on the fact that model code groups are "private," and that lobbying such groups does not constitute direct petitioning of government. This Court, however, has not limited *Noerr-Pennington* protection to direct petitioning. Indeed, this Court has not placed legal significance on the degree of proximity between the individual seeking to influence governmental action on the one hand, and the legislators on the other hand.

3. The Second Circuit's opinion holds out as the fatal flaw in the model code-making process the natural and inevitable self-interest of private participants. That approach is in direct conflict with this Court's recognition in *Noerr* that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* Indeed, this Court stated that "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." *Id.*

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[2] *See Petitioner's* Appendix A at 12a to Petition for Writ of Certiorari (hereinafter "Petition").

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4. The Ninth Circuit and two district courts have followed the *Noerr-Pennington* doctrine by holding that the Sherman Act does not prohibit the lobbying activities inherent in model code-making activity. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458 (9th Cir. 1987); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983); *Rush-Hampton Industries, Inc. v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976). The opinion of the Ninth Circuit in *Sessions Tank Liners* correctly holds that certain improper conduct by participants in model code groups may be subject to *Noerr-Pennington's* "sham" exception. In so holding, the Ninth Circuit provides an effective way of regulating abuses of the process while furthering *Noerr-Pennington's* twin pillars of promoting the free flow of information to the government and protecting the first amendment right to petition the government.

5. Harmful consequences are likely to occur if this Court affirms the Second Circuit's opinion below. A lack of participation by private competitors will greatly reduce the flow of vital information to the model code groups. As a result, inadequate model codes may be enacted into law; a greater number of catastrophes and injuries may occur and governments may lessen their reliance upon model codes. In any event, scarce public resources will have to be reallocated and greatly expanded. Legislators at all levels of government may have to create staffs to research and draft each political subdivision's model codes. Unless regional or national coordination is established by the various political subdivisions, each jurisdiction might adopt different codes, forcing industry to manufacture products to different standards and to build according to different practices, thus increasing the risk of defective products and injuries. Smaller competitors in particular

may be unable to undertake the widespread lobbying efforts necessary to persuade myriad jurisdictions to approve their products or processes. There is no reason to risk such harmful effects, when abuses of the model code-making system can be adequately handled by the sham exception to *Noerr-Pennington*.

III

ARGUMENT

A. The Second Circuit Decision Below Misapprehends the Fundamental Protection Afforded by the *Noerr-Pennington* Doctrine.

The Courts of Appeals for the Ninth Circuit and the Second Circuit have split on their view as to whether model code-making activity is protected by the *Noerr-Pennington*[3] doctrine. The Ninth Circuit held that *Noerr-Pennington* "immunizes proper lobbying — either singly or in combination with others — of a private association engaged in promulgating an important model code to influence legislative and executive decisions." *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458, 462 (9th Cir. 1987). By contrast, the Second Circuit determined that such groups might act "contrary to the public interest" and therefore held that *Noerr-Pennington* protection should be denied to model code-making activity.[4]

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[3] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[4] *See* Petition Appendix A at 13a-15a.

Prior to the split between the Courts of Appeals,[5] the law on the application of *Noerr-Pennington* to model code-making activities was clear: Proper activity[6] aimed at influencing the content or passage of legislation was protected, while activity merely incident to legislation was not.[7] The Second Circuit, however, has rejected this

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[5] *Amici* believe that the decision of the Second Circuit can be distinguished from the decision of the Ninth Circuit on the basis that the model code group before the Second Circuit apparently permitted full voting rights to private members of industry, while the WFCA — the model code group before the Ninth Circuit — did not. *See Sessions Tank Liners, Inc., supra*, 827 F.2d at 461 n.2, 466. The Ninth Circuit correctly recognized that the distinction bears on whether an "abuse of process" occurred that would call into play the sham exception to *Noerr-Pennington*, not on whether *Noerr-Pennington* protection should be afforded model code-making activity. *Id.* at 466.

[6] The "sham" exception to the *Noerr-Pennington* doctrine excludes from protection improper activity. *See* Brief of *Amici Curiae*, sec. D *infra*.

[7] A number of decisions which have denied *Noerr-Pennington* protection illustrate that the central inquiry is whether the activity in question is genuinely intended to influence the passage or content of legislation. In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), for example, this Court denied *Noerr-Pennington* protection to a U.S. corporation which argued that the activities of its wholly owned subsidiary — which had been appointed as the exclusive purchasing agent of a foreign government — were protected. This Court characterized the activity in question as "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707. Similarly, in Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), the lower court afforded *Noerr-Pennington* protection to members of a medical society on the ground that it was "an integral part[ ] of the state's apparatus for regulating the practice of medicine," but the Fifth Circuit reversed finding that, while "[h]ospital medical staffs and medical societies play an important role in Florida's regulatory scheme, . . . that role is not a governmental one." 586 F.2d at 543, 545.

simple distinction and has sent a chilling message to model code groups throughout the country. By denying *Noerr-Pennington* protection to model code-making activity, the Second Circuit has stripped fundamental and vintage government petitioning of its constitutional protection. The Second Circuit has held, in effect, that *Noerr-Pennington* does not even protect the good faith and accurate assertion of claims involving product safety to a model code group; a party may be threatened by treble damage litigation even where it has served the public interest by accurately pointing out that a competitor's product is unsafe. *See Sessions Tank Liners,* 827 F.2d at 466 n.6.

B. Model Code Groups Provide a Vital and Beneficial Public Service, and Government Relies Upon Them to Do So.

As a practical matter, states and their political subdivisions have delegated to model code groups like ICBO, SBBCI, BOCA and WFCA the task of developing building and fire-safety codes. Such work requires a tremendous amount of time, money and expertise.[8] Smaller

In addition, a number of cases hold that submissions and filings required by law do not receive *Noerr-Pennington* protection simply because governmental action is an incident to legally-required regulation. *See, e.g.,* Cantor v. Detroit Edison Co., 428 U.S. 579, 601-03 (1976); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984); City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982), *cert. denied,* 459 U.S. 1170, 1180-81 (1983).

[8]The extent of model code-making activity is enormous. Some 32,000 codes and standards have been promulgated by over 420 private organizations. National Bureau of Standards, Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984). Government regulations incorporate many codes and standards by reference. See, e.g., 29 C.F.R. § 1910.66(c)(22)(i)

jurisdictions do not have the staff or funds to develop their own codes, and often adopt the model codes with little or no change.[9] Larger jurisdictions, such as states or counties, might have the staff, but would be forced to reallocate their resources, and fail to provide other vital services if they did not obtain the benefits of the efforts of the model code groups. Industry members play a vital role in this effort by providing expertise gained by research, development and manufacturing experience that may be unavailable to government employees.[10] In addi-

(1986); 33 C.F.R. § 183.435(a)(1) (1986); 42 C.F.R. § 52b.11(b)(3) (1986); 42 C.F.R. § 57.112. app. A, ¶ (e) (1986); 46 C.F.R. § 63.05-85(b)(1986); and 49 C.F.R. § 192.163(e)(1986), all of which incorporate the NEC by reference.

[9]See n.1 to the Second Circuit's opinion below, in which the court points out that as of 1982, the NEC had been adopted without change in 26 of 51 state jurisdictions, and 19 had adopted the NEC with an average of twelve amendments. Of 495 cities surveyed, 232 adopted the NEC as written, and 256 adopted it with an average of eleven amendments. (No information is provided as to the types of amendments made, or the extent of lobbying, if any, of the governmental entities which enacted amendments to the NEC.) As indicated above, the model codes promulgated by *amici* enjoy a similar influence. Contrary to the Second Circuit's conclusion that the NEC study shows that *Noerr-Pennington* protection is unnecessary to protect model code-making activity because competitors can lobby governmental entities directly, *amici* submit that the study establishes the importance of dealing with the model code at its creation, and the impossible effort necessary to lobby literally hundreds or even thousands of separate jurisdictions. Other than the Second Circuit, all of the other courts which have considered this issue have reached the same conclusion. *See infra* note 12 and accompanying text.

[10]See, e.g., G. Stein, *Quake Adds to Agenda For Structural Engineers,* L.A. Times, Oct. 12, 1987, pt. 1 at 3, col. 1, which reports the review of a new model building code adopted in September 1987 by ICBO, one of *amici* herein, toughening earthquake standards. The code was developed by the Structural Engineers Association of

tion, competitors now rely on model codes in developing their products, knowing that the standards adopted will be applied almost universally.

Moreover, if there were no model code organizations, different codes in each political subdivision could create chaos, facing competitors with the impossible task of lobbying hundreds of separate jurisdictions, and forcing them to manufacture products to different standards, thereby causing a far greater risk of unsafe products or building practices slipping through overworked government employees.[11]

Therefore, the model code groups provide a vital and beneficial public service, and the various governmental entities rely upon them to do so. As the district court recognized in this case, any person wishing to change or affect the fire, safety or other building code of a political subdivision must start that political process at the level of the relevant code group.[12]

California. The code took eight years to draft, in a voluntary effort that took an estimated 10,000 hours, at a cost of over $1 million. The article quoted experts who stated that most local jurisdictions west of the Mississippi are expected to adopt the code, and that if the buildings damaged by the recent California earthquake had been built according to the new code, damages would have been at most one tenth of the $177 million estimated.

[11]Indeed, the small competitor with limited resources would be most harmed if forced to engage in extensive lobbying, and to develop and manufacture products according to different specifications. The weakening of model code groups is thus likely to have an anti-competitive effect of strengthening the largest competitors, who can better afford such a burden.

[12]*See* Petition at 13. See also Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 463 (9th Cir. 1987) ("The WFCA's substantial power and the Code's impact on local fire safety laws cannot be denied."); Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit

The continued vitality of model code groups' efforts to affect legislation depends entirely on the ability of their members, and participants from industry and the public, to express freely political views without the threat of protracted antitrust litigation and treble-damage liability. Without such protection, interested parties would be unlikely to participate in the model code-making process.[13] The repercussions felt first in the model code groups would extend to governmental entities which rely upon the combination of governmental and private efforts that promulgate the model codes. Legislative resources currently allocated to promulgating and adopting these codes would have to be reallocated and greatly expanded and the considerable void in model code-making activity that would result from increased antitrust scrutiny would somehow have to be filled.[14]

C. Proper Activity Designed to Influence the Passage or Content of Legislation is Protected From Antitrust Laws Under the *Noerr-Pennington* Doctrine.

The Second Circuit adopted in essence a mechanical test, permitting *Noerr-Pennington* protection only when individuals "directly" petition the government. The Sec-

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Corp., 573 F. Supp. 833, 838 (N.D. Ill. 1983); Rush-Hampton Indus., Inc. v. Home Ventilating Inst., 419 F. Supp. 19, 22-23 (M.D. Fla. 1976), which reached the same conclusion.

[13]Indeed, *Respondent* Indian Head, Inc. initially joined the NFPA as a defendant in this action. If such associations and their members, who are primarily public employees, face antitrust liability, the "chilling" effect on model code groups could be fatal. Such associations and public employees, who provide a public service with limited resources and no financial incentive, have little reason to continue such service in the face of protracted litigation, attorneys' fees, and possible treble damage verdicts.

[14]*See supra* note 8.

ond Circuit concluded first, that the "quasi-governmental" status of model code groups does not merit *Noerr-Pennington* protection, because such groups are not elected, and thus not directly accountable to the public at large. Second, the Second Circuit held that "indirect" petitioning of government through model code groups is an insufficient basis for protection, simply because it is indirect, and direct petitioning of the relevant political subdivisions is theoretically available. The Second Circuit has created a superficial distinction between individuals who attempt to persuade government through participation in private organizations and individuals who seek government action directly without such association. Nothing in this Court's *Noerr-Pennington* doctrine supports such a distinction. Indeed, this Court's decision in *Noerr* thoroughly dispels any notion that proximity of the individual to the political arena has legal significance in deciding whether *Noerr-Pennington* applies.

A "no-holds-barred fight" erupted in *Noerr* between the well-established railroad industry and the rising trucking industry, both seeking control of a profitable source of income. 365 U.S. at 144. The railroads launched a vicious publicity campaign against the truckers by distributing circulars, making speeches, and writing editorials, magazine articles and memoranda. The lower courts characterized this activity as the "third-party technique," that is, " 'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information' " by "giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." 365 U.S. at 140 (*quoting in part* from the lower courts' opinion). The use of the "third-party technique" in the railroads' publicity campaign was one reason the lower courts applied the Sherman Act to the railroads' conduct. 365 U.S. at 140.

This Court reversed, holding that although the publicity campaign was directed to the public at large, it was a genuine effort to influence legislation, and thus constitutionally protected. 365 U.S. at 144-45.

> [W]hatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

365 U.S. at 142.

That such a method may afford opportunity to injure a competitor does not take the case out of *Noerr-Pennington*. Another reason the lower courts applied the Sherman Act to the railroads' activity in *Noerr* was that it found that " *'[i]t was the purpose and intent [of the railroads] . . . to hurt the truckers in every way possible even though they secured no legislation.'* " 365 U.S. at 142 (*quoting* from the lower courts' opinion). This Court rejected the rationale:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

365 U.S. at 143-44.

Following *Noerr*, the Ninth Circuit in *Sessions Tank Liners, supra*, held that model code-making activity is *Noerr-Pennington* protected. In that case, plaintiff alleged

that Joor Manufacturing ("Joor") violated the Sherman Act, 15 U.S.C. sections 1 and 2, by persuading the Western Fire Chiefs Association ("WFCA"), one of *amici* herein, to amend its Uniform Fire Code to prohibit plaintiff's process of repairing leaks in underground storage tanks. The Ninth Circuit, affirming the district court, held that "legitimate efforts to influence or lobby private, model code associations *are* protected by the *Noerr-Pennington* doctrine." 827 F.2d at 460. In so holding, the Ninth Circuit was persuaded by the decisions of this Court protecting the right to petition those "who are not governmental actors but who are nevertheless involved in the political process." 827 F.2d at 462-63.[15] The Ninth Circuit recognized that in *Noerr* itself "an important component of the railroads' strategy was to exert pressure on governmental actors through the medium of public opinion." 827 F.2d at 463.[16]

Two district courts have also held that members of private industry are protected by *Noerr-Pennington* when they are participating in model code groups. *See Rush-Hampton Industries, Inc. v. Home Ventilating Institute,* 419

[15]In Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 7 (1964), this Court determined that the right to petition the courts extended to a workers' cooperative plan to advise one another of legal rights. In NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907, 913-15 (1982), this Court held that activities designed to persuade private parties to join in a commercial boycott were protected where the boycott was part of an effort to procure governmental action.

[16]Additional bases supporting the Ninth Circuit's decision include that model code-making activity furthers political process interests and that the Sherman Act should not generally make parties liable for governmental acts. 827 F.2d at 463-64. Further, the Ninth Circuit recognized that first amendment associational rights are "plainly implicated" in model code groups. 827 F.2d at 463, 466 n.6.

F. Supp. 19 (M.D. Fla. 1976); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.,* 573 F. Supp. 833 (N.D. Ill. 1983). In each of those cases, contrary to the Second Circuit's speculation, the courts held that the most effective means by which an individual can "communicate its position to the powers that be," is to approach the model code group. *See, e.g., Wheeling-Pittsburgh,* 573 F. Supp. at 841.

In *Rush-Hampton,* a manufacturer financed a campaign of opposition to prevent its competitor from obtaining product approval from the regional building code organizations (several of *amici curiae* herein). The court extended *Noerr-Pennington* protection to the manufacturer, even though the court was convinced that the manufacturer was seeking to influence the regional building code organizations in a manner that would benefit it:

> This they had the right to do; the antitrust laws do not prevent presentation of arguments before legislative, judicial and administrative bodies even though such arguments and presentations, if successful, may adversely affect some business, industry or occupation.

419 F. Supp. at 25.[17]

[17]In *Rush-Hampton,* the court noted that the regional building model code groups performed functions which were both legislative in nature (drafting of model codes) and adjudicatory in nature (approving specific products). In trying to characterize the activities of these organizations, the court said the organizations were "quasi-administrative bodies." 419 F. Supp. at 24. In *Sessions Tank Liners,* the Ninth Circuit found it unnecessary to characterize model code groups: "The WFCA, whether designated as 'public,' 'private,' or even 'quasi-governmental,' plays an important and generally accepted role in the legislative process of the western states." 827 F.2d at 463.

Similarly, in *Wheeling-Pittsburgh,* one competitor allegedly conspired to prevent another from obtaining product approval from the National Fire Protection Association ("NFPA"), the model code group involved in this dispute, and United Laboratories ("UL"). 573 F. Supp. at 835. The court extended *Noerr-Pennington* protection because "[s]uch wholehearted reliance upon the NFPA and UL has resulted in a near complete delegation of governmental authority to these otherwise private entities," and because of such reliance, "[i]n order to influence effectively the governmental entities, [defendant] had no option but to lobby [them]." 573 F. Supp. at 838. *See also Federal Prescription Service, Inc. v. American Pharmaceutical Association,* 471 F. Supp. 126, 130 (D.D.C. 1979) (druggists who approached a "clearly non-governmental organization" allegedly to interfere with plaintiff's business of mailing prescription drugs were protected by *Noerr-Pennington* because the activities "were at least indirect attempts to influence governmental behavior"), *aff'd,* 663 F.2d 253, 262 n.6 (D.C. Cir. 1981) (alternative holding), *cert. denied,* 455 U.S. 928 (1982).

The Second Circuit's opinion below is out of step with *Noerr* and succeeding decisions of this Court, and is in direct conflict with *Sessions Tank Liners, Wheeling-Pittsburgh* and *Rush-Hampton.* The Second Circuit's opinion denies the realities of our political system and imposes on model code groups the impossible and counter-intuitive obligation of ferreting out self-interest before members of these groups may enjoy the protection of petitioning the government free from antitrust liability. The entire basis for the Second Circuit's opinion flows from its concern that model code groups "might operate contrary to the public interest" particularly "in view of their importance within the economy." *See* Petition at 15a, 14a. This reasoning misses the point.

Model code groups enjoy the respect of the governmental entities who rely upon them because these groups are able to mobilize governmental and private resources to develop codes. Silencing private participants in the groups by exposing them to antitrust liability for pointing out the faults of a competitor's product will diminish, if not extinguish, the value such groups have. This Court knows that it "is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Noerr,* 365 U.S. at 139. This Court has said that "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." *Id.*

D. Abuses of the Model Code System Can Best Be Controlled Through the "Sham" Exception to the *Noerr-Pennington* Doctrine.

Rather than denying constitutional protection to methods of legislative influence that leave open the door the possibility of subterfuge, this Court mentioned in *Noerr,* and lower courts have applied, the "sham exception." 365 U.S. at 144. Briefly stated, the sham exception applies to conduct that is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.*

> The term 'sham' can be a term without boundaries. Some courts and commentators use it as a catchall for any activity that is not afforded *Noerr* protection. But the basic concept, as employed by the Supreme Court, is that the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision.

P. Areeda & H. Hovenkamp, *Antitrust Law* 13-14 (1987 Supp.) (footnote omitted).

The Ninth Circuit in *Sessions Tank Liners* recognized the applicability of the sham exception to model code-making activity and remanded that case for determination of a "limited 'sham' exception claim." 827 F.2d at 468.[18] Indeed, the Ninth Circuit concluded in *Sessions Tank Liners* that while the Second Circuit may have

> simplified the law by reducing drastically the scope of the 'sham' exception . . . it complicated the law by requiring that the antitrust law develop the permissible practices of model code associations, their members, and participating non-members. It is unlikely that this exchange will result in a net simplification.

822 F.2d 465-66. In other words, model code groups will be faced with endless litigation defining "permissible practices," rather than the control of abuses through application of the sham exception. Implicit in the Ninth Circuit's characterization of the effect of the Second Circuit opinion is the conclusion that the proper and beneficial activities of model code groups will be greatly

[18]The Ninth Circuit indicated that alleged improper conduct may be subject to the sham exception if it amounts to an "abuse of process" which "capture[s]" the decision-making process of the code group. 827 F.2d at 466. Ultimately, the Ninth Circuit rejected all of Joor's claims of "sham" activity in the model code-making process, including alleged misrepresentations of fact to the subcommittee, because all were in the "political arena," as were the distortions of fact in the publicity campaign in *Noerr*. 827 F.2d at 467-69. The case was remanded so that plaintiff could pursue a limited claim under the sham exception, under which plaintiff alleged that, outside the WFCA code-making activities, Joor made misrepresentations to persuade public officials acting in their administrative capacity to deny certain permits.

reduced due to the fear and uncertainty created by that opinion over what may constitute improper conduct.

Excepting "inappropriate" or "improper" lobbying activity from *Noerr-Pennington* protection by invoking the sham exception is an effective way of regulating subterfuge of the political process. The sham exception precludes the possibility that *any* activity, whether it is model code-making or otherwise, may be totally exempt from antitrust scrutiny.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request this Court to reverse the decision of the Second Circuit.

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